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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. HARRY JACKSON BOYD, Defendant and Appellant.	B297468 (Los Angeles County Super. Ct. No. MA007943)

APPEAL from a judgment of the Superior Court of Los Angeles County, Shannon Knight, Judge. Affirmed.

Mays Law Group, Jakgeem Mays and Jarrett Adams for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Acting Senior Assistant Attorney General, Idan Ivri and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437), effective January 1, 2019, amended the felony-murder rule and eliminated the natural and probable consequences doctrine as it relates to murder. Under Penal Code section 1170.95,[1] a person who was convicted under theories of felony murder or murder under the natural and probable consequences doctrine, and who could not be convicted of murder following the enactment of SB 1437, may petition the sentencing court to vacate the conviction and resentence on any remaining counts.

In 1997, a jury convicted appellant Harry Jackson Boyd of two counts of first degree murder and found robbery-murder special-circumstances allegations to be true. Following the enactment of SB 1437, appellant filed a petition under section 1170.95 to vacate his murder convictions. The trial court summarily denied appellant's petition, finding him ineligible for relief based on the jury's special-circumstance findings,

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[1] Undesignated statutory references are to the Penal Code.

which according to the court, showed the jury found that he had aided and abetted the murders with the intent to kill.

Appellant challenges this conclusion on appeal, arguing that the jury was confused and did not necessarily find he had acted with the intent to kill. We conclude the trial court correctly denied appellant's petition and therefore affirm.

BACKGROUND[2]

In 1996, the Los Angeles County District Attorney's office charged appellant and his co-defendant, Terry Tyrone Evans, with two counts of first degree murder. As relevant here, the information alleged that appellant and Evans committed the murders while engaged in the commission of a robbery for purposes of section 190.2, subdivision (a)(17).[3] According to the People's evidence at trial, appellant and Evans planned

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[2] We have granted respondent's request to take judicial notice of, inter alia, the record in appellant's prior appeal (*People v. Evans and Boyd* (Sept. 24, 1998, B113243) [nonpub. opn.]), and in his habeas corpus proceeding before this court (*In re Boyd* (B281063), den. May 25, 2017). Appellant's motion to augment the record is denied as moot.

[3] Section 190.2, subdivision (a), lists special circumstances under which a person convicted of first degree murder shall be sentenced to death or imprisonment in the state prison for life without the possibility of parole. (*Ibid.*) One of those special circumstances is the commission of first degree murder in the course of a robbery. (*Id.* at subd. (a)(17).) For a person who was not the actual killer, this special circumstance applies only if he aided and abetted the murder, acting with the intent to kill, or was a major participant in the robbery and acted with reckless indifference to human life. (*Id.* at subds. (c) & (d).)

and executed the robbery-murders together, but it was undisputed that Evans alone shot and killed the victims. Appellant testified in his defense that although he was present when Evans committed the murders, he was not involved in the crimes.[4]

At the conclusion of trial, the court instructed the jury under CALJIC No. 3.00, which provided that "principals" liable for a crime included "[t]hose who actively and directly commit the act constituting the crime" and "[t]hose who aid and abet the commission of the crime." In describing the liability of an aider and abettor, the court instructed the jury on the natural and probable consequences doctrine.[5] As to the robbery-murder special-circumstance allegations, the court instructed the jury under CALJIC No. 8.80.1, inter alia: "**If you find**

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[4] While both parties devote substantial portions of their briefs to the evidence at trial, we find it unnecessary to do so, in light of the jury's findings on the special-circumstance allegations. As the parties acknowledge, the convictions, including the findings, are long since final.

[5] "Under the natural and probable consequences doctrine, '[a]n aider and abettor is guilty not only of the intended, or target, crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of the target crime.'" (*People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 433-434, quoting *People v. Smith* (2014) 60 Cal.4th 603, 611.) Thus, prior to SB 1437's enactment, if a person aided and abetted only an intended assault, but a murder resulted, that person would be guilty of murder "'"if it [wa]s a natural and probable consequence of the intended assault."'" (*People v. Smith*, *supra*, at 611.) As discussed further below, SB 1437 eliminated the natural and probable consequences doctrine as it relates to murder.

that a defendant was not the actual killer . . . , you cannot find the special circumstance to be true . . . unless you are satisfied beyond a reasonable doubt that such defendant[,] with the intent to kill[,] aided [and abetted] . . . any actor in the commission of murder in the first degree." (Bolding added.)

During deliberations, the jury sent two notes to the court. First, the jury requested a definition of the phrase "actively and directly commit the act" in CALJIC No. 3.00. After conferring with counsel, the court declined to further define the phrase. Next, the jury asked whether it was required to be unanimous in deciding what made a person a "principal" for purposes of CALJIC No. 3.00. The court answered that the jury need not be unanimous on this issue.

The jury then found both appellant and Evans guilty as charged, and found the special-circumstance allegations to be true. Appellant was sentenced to two terms of life without the possibility of parole, plus four years. We affirmed the judgment of conviction in an unpublished opinion. (*People v. Evans and Boyd*, *supra,* B113243.)

Appellant subsequently filed a petition for writ of habeas corpus in the superior court, contending, among other things, that under *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), it was prejudicial error to instruct the jury on the natural and probable consequences doctrine.[6] The court denied the

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[6] Under *Chiu*, *supra*, 59 Cal.4th at 158-159, "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Ibid.*)
(*Fn. is continued on the next page*.)

petition, reasoning that the jury's special-circumstance findings established that it necessarily had found appellant aided and abetted the murders with the intent to kill, and therefore that it did not rely on the natural and probable consequences doctrine. Appellant then filed a habeas petition in this court, raising the same contentions. We summarily denied that petition.

In 2019, appellant filed a petition under section 1170.95 to vacate his convictions, alleging he was convicted of murder under the natural and probable consequences doctrine, and claiming he could not be convicted of that offense following SB 1437's enactment. The trial court summarily denied the petition, again relying on the jury's special-circumstance findings to conclude the jury necessarily had found appellant aided and abetted the murders with the intent to kill. The court therefore found appellant ineligible for relief under section 1170.95. Appellant timely appealed.

DISCUSSION

A. *SB 1437's Limitation of Accomplice Liability for Murder and Petitions for Relief Under Section 1170.95*

The Legislature enacted SB 1437 "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder

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Chiu's holding applies retroactively on collateral review. (*In re Lopez* (2016) 246 Cal.App.4th 350, 360.)

liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1(f).) SB 1437 amended section 189 to provide that a participant in qualifying felonies during which a death occurs generally will not be liable for murder unless that person was (1) the actual killer, (2) a direct aider and abettor in first degree murder, acting with the intent to kill, or (3) a major participant in the underlying felony, acting with reckless indifference to human life.[7] (§ 189, subd. (e).) SB 1437 also amended section 188's definition of malice for purposes of murder to provide that "[m]alice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) As a result, the natural and probable consequences doctrine can no longer support a murder conviction. But direct aider and abettors to first degree murder, acting with the intent to kill, remain liable for that offense even after SB 1437. (See § 189, subd. (e)(2).)

SB 1437 also added section 1170.95 to the Penal Code. This section permits individuals who were convicted of felony murder or murder under a natural and probable consequences theory, and who could not be convicted of murder following SB

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[7] This limitation does not apply "when the victim is a peace officer who was killed while in the course of the peace officer's duties, where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties." (§ 189, subd. (f).)

1437's changes to sections 188 and 189, to petition the sentencing court to vacate the conviction and resentence on any remaining counts. (§ 1170.95, subd. (a).) The parties debate the exact procedures the statute prescribes to determine a petitioner's eligibility for relief, but it is clear that a petitioner must make a prima facie showing of entitlement to relief before the court is obligated to issue an order to show cause and hold a subsequent hearing.[8] (See § 1170.95, subd. (c) ["If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause"].)

B. *The Trial Court's File Conclusively Shows Appellant Is Ineligible for Relief*

Appellant challenges the summary denial of his petition, arguing he has made a prima facie showing of entitlement to relief under section 1170.95. Relying in part on the superior court's instruction on the natural and probable consequences doctrine at his trial, he contends that the jury could have found him guilty under that now-invalid theory of liability. Because the trial court denied appellant's petition without holding an evidentiary hearing, we review its ruling de novo. (Cf. *In re Stevenson* (2013) 213 Cal.App.4th 841, 857 [where trial court resolves habeas proceeding without evidentiary hearing or

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[8] We need not decide the precise procedures the statute affords because as explained below, the record conclusively shows appellant was ineligible for relief.

makes findings based only on documentary evidence, review is de novo].)

The trial court correctly concluded appellant was conclusively ineligible for relief under section 1170.95 based on the jury's special-circumstance findings.[9] At appellant's trial, the court instructed the jury under CALJIC No. 8.80.1 that it could not find the robbery-murder special-circumstance allegations to be true as to a defendant who was not the actual killer unless he aided and abetted the murder with the intent to kill. As it was undisputed that appellant was not the actual killer of either of the victims, the jury's findings that these special-circumstance allegations were true leave no doubt that it found appellant had aided and abetted the first degree murders of both victims with the intent to kill. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 139 [jurors presumed to understand and follow court's instructions].) These findings rendered appellant ineligible for relief under section 1170.95.[10]

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[9] Appellant does not argue the trial court erred in looking to its file in considering his eligibility for relief. He has therefore forfeited any contention in this regard. (*Browne v. County of Tehama* (2013) 213 Cal.App.4th 704, 726 [failure to raise argument in opening brief constitutes forfeiture].) We note that the question whether courts may consider this material in reviewing a petition under section 1170.95 is currently pending before our Supreme Court in *People v. Lewis* (2020) 43 Cal.App.5th 1128, review granted March 18, 2020, No. S260598.

[10] In summarily denying appellant's habeas petition, in which he argued that the jury was erroneously instructed on the natural and probable consequences doctrine, we cited *People v. Covarrubias* (2016) 1 Cal.5th 838, 902, fn. 26 (*Covarrubias*). There, our Supreme
(*Fn. is continued on the next page.*)

(See § 1170.95, subd. (a) [petitioner must show he could not be convicted of murder following SB 1437's changes to §§ 188 and 189]; § 189, subd. (e)(2) [aider and abettor to first degree murder, acting with intent to kill, may be convicted of murder]; cf. *People v. Gutierrez-Salazar* (2019) 38 Cal.App.5th 411, 420 [defendant ineligible for relief under SB 1437 on direct appeal where jury had found robbery-murder special-circumstance allegation true].)[11]

Court held that even when the jury is instructed on both valid and invalid theories of guilt, reversal of a conviction is unwarranted if the record reveals beyond a reasonable doubt that the jury relied on the valid theory. (*Ibid.*) Our citation to *Covarrubias* indicated our conclusion that the jury's special-circumstance findings established beyond a reasonable doubt that the jury did not rely on the natural and probable consequences doctrine in finding appellant guilty. The same conclusion holds true in this proceeding.

[11] Citing *People v. Smith* (2020) 49 Cal.App.5th 85, review granted July 22, 2020, S262835 (*Smith*), appellant asserts juries' special-circumstance findings cannot support definitive conclusions on petitioners' eligibility for relief under section 1170.95. *Smith* does not stand for this proposition. There, a jury convicted the petitioner of first degree murder under a theory of felony murder, and found true a robbery-murder special circumstance based on the conclusion that the defendant was a "major participant" in the robbery and acted with "reckless indifference to human life." (*Smith*, *supra*, at 93.) The conviction and special circumstances finding were affirmed on appeal. (*Id.* at 89.) Following the decision on direct appeal but before the petitioner filed his section 1170.95 petition, our Supreme Court narrowed the meanings of "major participant" and "reckless indifference to human life." (*Smith*, at 93.) Because the petitioner's jury had not been asked to resolve the factual issues our Supreme Court had since identified as controlling, the *Smith* court concluded the jury's findings could not
(*Fn. is continued on the next page.*)

Appellant argues the jury's special-circumstance findings are unreliable because the jury's submitted notes during deliberations suggested it was confused about the court's instructions. We disagree that the jury's findings are unreliable.

During deliberations, the jury requested a definition of the phrase "actively and directly commit the act" in CALJIC No. 3.00, and later asked whether it was required to be unanimous in deciding what made a person a "principal" for purposes of that instruction.[12] Whatever these submissions might have suggested about the jury's understanding of the term "actively and directly commit" in CALJIC No. 3.00, they suggested no confusion about the term "actual killer" in CALJIC No. 8.80.1. Nothing indicated the jury found appellant was the victims' actual killer, as would eliminate the intent-to-kill requirement for purposes of the robbery-murder special-circumstance allegation -- it was undisputed that he was not. The superior court's instruction under CALJIC No. 8.80.1 was clear and easy to understand, and we presume the

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establish the petitioner's ineligibility for relief under section 1170.95 as a matter of law. (*Smith*, at 93-94.)

Unlike the petitioner in *Smith*, appellant identifies no intervening change in the law applicable to his jury's special-circumstance findings. Thus, *Smith* is inapplicable to him.

[12] As noted, the superior court instructed appellant's jury under CALJIC No. 3.00, which provided that "principals" liable for a crime included "[t]hose who actively and directly commit the act constituting the crime" and "[t]hose who aid and abet the commission of the crime."

jury followed it. (See *People v. Yeoman*, *supra*, 31 Cal.4th at 139.)

In addition to suggesting the jury was confused, appellant relies on a version of events the jury manifestly rejected to argue that "neither the murder convictions nor the special-circumstance findings are supported by substantial evidence." As appellant concedes, however, "this Court cannot reverse his convictions." Neither can we reverse the special-circumstance findings. Simply put, the jury could not have returned those findings without determining that appellant aided and abetted in the murders of two people with the specific intent to kill. Accordingly, the trial court properly denied appellant's petition for relief under section 1170.95.

DISPOSITION

The judgment is affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.